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Expropriation without compensation

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Document Version
Other version

Publication date:
2018

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Hoops, B. (2018). Expropriation without compensation.

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L.M. Klap-de Nooijer

Date
13 June 2018

Esteemed members of the Joint Constitutional Review Committee,

It was with great interest that I took note of the initiative of the National Assembly, in concurrence with the National Council of Provinces, to identify and reflect upon constitutional amendments necessary to permit expropriations of land for land reform purposes without the payment of compensation. Herewith I submit considerations that Your Committee may wish to take into account before proposing amendments to the Constitution of the Republic of South Africa.

In the first part of my submissions I deal with the question of whether expropriations of land without compensation, as contemplated by the President of the Republic of South Africa in public statements, would be unconstitutional under the law as it stands. The second part briefly sketches objections to the economic and societal desirability of a constitutional amendment. The third part addresses the issue of the constitutional limitations to which the amendment would be subject. The fourth part discusses the safeguards that should be installed in the amendment to prevent abuse of the power to expropriate land without compensation, and provides model provisions for an amendment.

1. Is an amendment required to make expropriation without compensation constitutional?

Section 25(2) of the Constitution of the Republic of South Africa permits the state to expropriate property for a project that serves a public purpose or is in the public interest. As follows from Section 25(4)(a) of the Constitution, the public interest may justify expropriations for land reform purposes. The expropriation forces the owner to bear a burden in the public interest. To spread this burden among all citizens the state is required in most countries to pay the expropriated owner some form of compensation. Concerning the amount of compensation Section 25(3) of the Constitution provides that

“[t]he amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.”

It is clear from this provision that the property's market value is merely one of the factors that the courts have to take into account when determining the compensation. The amount of compensation must be just and equitable in the light of the history of the property, its current use and value, and the purpose of the expropriation. It is generally accepted that just and equitable compensation depends upon the circumstances of each individual case and may be lower than the property's market value.

Public statements of the President of the Republic of South Africa indicate that expropriations without compensation are intended to facilitate land reform initiatives, but should, at the same time, not have an adverse impact upon agricultural production, food security, and economic performance in South Africa. The Constitutional Court has yet to rule on the issue of whether Section 25(3) stands in the way of expropriations of property without compensation for such projects (or any other project in the public interest, for that matter). There is thus a lack of legal certainty concerning this issue.

In the legal literature scholars have argued that expropriation without compensation may be just and equitable and have pointed to several avenues towards it. *Elmien Du Plessis* (Associate Professor at NWU) has argued on the basis of Section 25(3)(e) that land reform as an instrument to address the injustices of the past should justify a reduction of the amount of compensation below the property's market value (W.J. Du Plessis, 'The Public Purpose Requirement in the Calculation of Just and Equitable Compensation', in: B. Hoops *et al* (eds), *Rethinking Expropriation Law I: Public Interest in Expropriation*, pp. 369-387, pp. 379 *et seq*). I agree with Du Plessis in that direct or indirect beneficiaries of past racial discrimination should receive compensation that is lower than market value if the expropriation serves to alleviate the consequences of this past discrimination. The importance of this goal also finds its expression in Sections 25(4)(a) and (5) of the Constitution.

The late Prof. *André Van der Walt* argued that the purpose of the expropriation (*i.e.*, land reform) was only one of the factors to be taken into account. It could not trump all other factors and by itself reduce the compensation to zero. However, together with other factors, land reform could possibly justify zero compensation. Where, for example, the Apartheid regime had heavily subsidised the acquisition and development of the property, zero compensation might be justifiable with reference to Section 25(3)(b) and (d) (A.J. Van der Walt, *Constitutional Property Law*, 3rd edition, pp. 504-520, in particular pp. 506 and 514). I fully agree with *Van der Walt*.

Section 25(3)(a) further suggests that owners who neglect their land or use their land in another socially undesirable manner may receive less than market value (see Van der Walt, p. 512) and, if expropriated for land reform, they may arguably receive no compensation at all. Only expropriations of such properties are sufficiently likely not to have an overall adverse impact upon agricultural production, food security, and economic performance. Section 25(3)(a) and (e) would thus allow for zero compensation in the cases that the President of the Republic of South Africa seems to have in mind. ***This argument would indicate that a constitutional amendment may not be necessary and that the government may rather want to bring a test case before the Constitutional Court and await its response.***

Note: If the government wishes to expropriate land without compensation for land reform purposes under *other circumstances*, a constitutional amendment would be necessary for the constitutionality of such expropriations. Section 25(8) of the Constitution does *not* provide a basis for zero compensation in such cases. This provision reads as follows:

"No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

Any state action, even state action for land reform purposes under Section 25(8), must be in line with Section 36(1) of the Constitution. As Section 36(1) ensures the proportionality of the expropriation and compensation is generally vital to the expropriation's proportionality, Section 25(8) does not permit expropriations without compensation. It would also be unsettling if this provision allowed for measures that are not just and equitable in terms of Section 25(3).

The conclusion that zero compensation would be constitutional under certain circumstances is compatible with other constitutional provisions. Sections 25(1), 33(1) and 36(1) of the Constitution, in essence, require that the adverse impact of the expropriation be proportionate with respect to the public benefits of the expropriation. Generally, compensation is an important means to ensure the proportionality of the expropriation. Where, however, neglected land of a beneficiary of Apartheid is expropriated for land reform purposes, the weight of the owner's interest is very low and the weight of the state's interest in the expropriation is very high. If zero compensation is just and equitable in terms of Section 25(3) in such cases, the expropriation without compensation should also be proportionate.

In paying no compensation the state does not unfairly discriminate against the owner and, therefore, does not violate Section 9 of the Constitution. If the owner is a beneficiary of Apartheid, neglects his/her property, and/or the property is expropriated for land reform purposes, there is a valid reason to distinguish this owner's case from expropriations for other purposes.

There is, however, one practical objection to the conclusion that no constitutional amendment is necessary. The lower courts apply Section 25(3) in an inconsistent manner. The judgment of the Land Claims Court on the case *Nhlabathi and others v Fick* (LCC42/02) [2003] ZALCC 9 suggests that expropriations without compensation for land reform purposes may be proportionate. In the case *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* (LCC 156/2009) [2012] ZALCC 7, by contrast, Gildenhuys J refused to reduce the compensation for the sole reason that the expropriation served land reform. The Supreme Court of Appeal recently followed this opinion in the case *Uys & another v Msiza & others* (1222/2016) [2017] ZASCA 130. ***In the light of these judgments it is unlikely that expropriations without compensation would pass scrutiny in lower courts, which would delay land reform projects. A constitutional amendment would thus be necessary to ensure that expropriations without compensation smoothly pass judicial scrutiny.***

2. The economic and social desirability of expropriation without compensation

To enshrine the power to expropriate land without compensation (in certain cases) may facilitate land reform in South Africa by lowering the costs of the acquisition and avoiding valuation procedures.

However, it is doubtful that the amendment would actually have this effect. As the High Level Panel chaired by former President Kgalema Motlanthe concluded in its report, the obligation to pay compensation for expropriation is not a major obstacle to land reform. Rather, corruption, diversion of funding to elites, a lack of political will, and a lack of training and capacity stand in the way of an effective implementation of the land reform programme.

If we assume, for the sake of argument, that the constitutional amendment would be effective in facilitating land reform, ***there are still major objections against a constitutional amendment.*** If the amendment does not clearly define in which cases land may be expropriated without compensation, the threat of expropriation without compensation would deter owners from investing in their properties and new production technologies. Growth and job creation in the agricultural sector may come to a halt. If mortgaged properties are expropriated and the expropriated owners default on their loans, banks will make a loss. This would reduce the stability of the financial system and make the banks less inclined to extend loans to undertakings that may be prone to expropriation. These aspects taken together show that expropriation without compensation may jeopardise the stability of the agricultural sector and undermine food security.

As the requirements that an expropriation has to meet are very lenient in South African law compared to other jurisdictions (see B. Hoops, *The Legitimate Justification of Expropriation*, Chapters 6 and 7), compensation is – along with the administrative expropriation procedure – the only deterrent from the abuse of the power to expropriate land. If the requirement of compensation is partially or completely abolished, the constitutional amendment will invite corruption and abuse of power.

Also, the psychological consequences of the amendment should not be underestimated. The amendment, whether or not it is limited to certain cases, is likely to antagonise owners, in particular white farmers. This

may undermine the general acceptance of the land reform programme, jeopardising collaborative efforts to further land reform and the willingness to transfer skills to land reform beneficiaries. As these skills are often missing, the effectiveness of the whole land reform programme would be diminished.

Another objection would be that expropriation without compensation imposes the burden of a land reform project to a great extent upon land owners. Other direct or indirect beneficiaries of Apartheid, by contrast, do not need to contribute substantially to the land reform projects. A wealth tax that funds land reform projects would arguably be a better, albeit politically more controversial, means to fairly distribute the burden among the beneficiaries of Apartheid.

3. Limitations to the Constitutional Amendment

The Bill of Rights can be changed in accordance with Section 74(2) of the Constitution. If the necessary majority in both houses of Parliament approves the constitutional amendment introducing expropriation without compensation, the power of the state to expropriate without compensation will still be subject to a few limitations.

The right to housing of the expropriated owner under Section 26 and his/her right to health care, food, water, and social security under Section 27 of the Constitution would remain intact. As many land owners are heavily in debt, expropriation without compensation may result in the expropriated owner being deprived of these rights. Unless the constitutional legislator wishes to abolish these fundamental rights along with the right to compensation, the state will have to ensure that expropriated owners have access to the aforementioned services.

Even if Section 25 allows for expropriation without compensation and even if new expropriation legislation, such as a revised Expropriation Bill, provides a basis for expropriation without compensation in law, the expropriation would in my view still be subject to a proportionality test. As administrative action the expropriation will still have to be reasonable in terms of the Promotion of Administrative Justice Act (and Section 33 of the Constitution). As expropriations are very severe infringements of the fundamental right of property, this reasonableness test includes a test as to whether the expropriation's adverse impact is proportionate with respect to its public benefits. Particularly in cases where the state expropriates without compensation the fruits of the owner's own work and investments in his/her business or where expropriation without compensation takes away the owner's only source of income and/or threatens the existence of his/her business, the expropriation will certainly be disproportionate.

One may argue that a specific amendment and more specific expropriation legislation that allows for zero compensation would override the test of proportionality in expropriation cases. However, ***I would argue that proportionality as a legal principle is inherent to the rule of law.*** The basis of this argument is that South African law at least partially received the concept of 'proportionality' from German law (J. de Waal, 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights', SAJHR 1995, 1-29) and that German law considers proportionality an integral part of the rule of law. ***Section 1 of the Constitution refers to the rule of law as one of the founding values of the Republic of South Africa. A constitutional amendment can thus not circumvent proportionality tests without restricting the rule of law itself*** (which would at least require a three-quarter majority in the National Assembly and six supporting votes in the National Council of Provinces). To the extent that the constitutional amendment would contravene the principle of proportionality, the amendment would therefore be *unconstitutional constitutional* law and could not permit expropriations without compensation. The Committee should also take note of Art. 17(2) of the Universal Declaration of Human Rights, which prohibits the arbitrary deprivation of property, and other international obligations of the Republic of South Africa (see, for instance, E.C. Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy', *ICSID Review - Foreign Investment Law Journal* 2016, 167-193). Against this background, it is imperative that Parliament limit expropriation without compensation to those cases to which the President of the Republic of South Africa referred in his public statements.

In its *Harvey* judgment, the KwaZulu-Natal High Court recognised that an expropriation must be strictly necessary to enable the state to realise the public benefits of the land reform project (*J.R. Harvey v Umhlathuze Municipality and Others* (4387/08) [2010] ZAKZPHC 86, para 85). As is also required by Clause 2(2) of the 2015 Expropriation Bill, the state would thus first have to make a serious attempt to purchase the land. As necessity is an inherent element of proportionality and, therefore, of the rule of law, a constitutional amendment cannot circumvent this test of necessity without compromising the rule of law itself.

4. Essential Safeguards

Should Parliament decide to adopt a constitutional amendment permitting expropriation without compensation, it should install the following safeguards to prevent abuse of power.

The constitutional amendment should clearly specify in which cases land can be expropriated without compensation. ***An unspecific authorisation to expropriate land without compensation may be abused by the competent authorities.*** Even though the current national government only seems to contemplate expropriation without compensation in a clearly delineated group of cases, local expropriation authorities and subsequent national governments may take advantage of a power that is too broadly phrased. ***The constitutional amendment should therefore specify:***

- the type of property that can be expropriated without compensation, *i.e.*, ‘rights in land’;
- the current state or use of the land, *e.g.*, ‘land in a neglected state’, or ‘land in an unproductive state’;
- the person of the owner, *e.g.*, ‘a direct or indirect beneficiary of past discriminatory land policies’;
- the purpose of the expropriation without compensation, *i.e.*, ‘land reform project’, or ‘a project that promotes access to land on an equitable basis’.

To safeguard the human dignity of the expropriated owner and to ensure that s/he will not be deprived of the rights guaranteed by Sections 26 and 27 of the Constitution, the following clause should be added to the amendment:

“Insofar as an expropriation for which no compensation is due under [amended provision of the Constitution] substantially deprives the expropriatee of the rights that the expropriatee enjoys under Sections 26(1) and 27(1) of the Constitution, the state must pay an amount sufficient to ensure that the expropriatee can exercise the aforementioned rights.”

The state may only infringe the rights of people to the extent that this is necessary to bring about the promised public benefits. This principle of necessity should be enshrined in the amendment to avoid that the state resorts to expropriation without compensation where this is not necessary to implement the land reform project. Similar to Clause 2(2) of the Expropriation Bill, the amendment should provide that:

“[t]he power to expropriate land may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or the holder of an unregistered right in the land for the acquisition thereof on reasonable terms.”

This addition would prevent the costs of expropriation proceedings and may be sufficient to facilitate land reform projects because the owner would be inclined to sell the land on reasonable terms if s/he otherwise faced expropriation without compensation. This would also enhance the legitimacy of land reform.

The Committee may also wish to recognise the right of self-realisation of the owner. If the owner is willing and able to implement the land reform project on his/her own land in accordance with the wishes of the expropriating authority, the expropriation would be unnecessary and, therefore, unlawful. In an agricultural context, for instance, the self-realisation could be shaped as follows: The current owner agrees to transfer ownership to the land reform beneficiaries. The current owner retains a right to live on the land and farm on a certain part of it until s/he dies. The current owner agrees to assist the beneficiaries in building up their agricultural business. Under Dutch law, this instrument effectively prevents expropriations and

simultaneously ensures the realisation of the expropriation's purpose. ***In South Africa recognising the right of self-realisation could reduce the adversity created by the prospect of expropriation. Self-realisation could promote collaboration between the land owner and the beneficiaries of the land reform project, and facilitate the transfer of skills to the land reform beneficiaries.*** This would also enhance the legitimacy of land reform. The amendment should, therefore, provide that:

“[i]f the owner of the land notifies the expropriating authority of his willingness to implement the land reform project, the power to expropriate land may not be exercised unless the expropriating authority has without success attempted to design a reasonable self-realisation plan in collaboration with the owner or the owner is not able to implement such plan.”

I remain at your disposal for more detailed explanations (through e-mail or via skype). If you have any queries about these considerations, please do not hesitate to contact me.

Yours sincerely,

Dr Björn Hoops

Assistant Professor of Land Law

Author of the book: *The Legitimate Justification of Expropriation*, Cape Town: Juta, 2017.